

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>OLIVER A. DURU</b>	)	
Claimant	)	
VS.	)	
	)	
<b>RUBBERMAID SPECIALTY PRODUCTS</b>	)	Docket No. 208,113
Respondent	)	
Self-Insured	)	

**ORDER**

Respondent appealed from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on July 21, 1997. The Appeals Board heard oral argument in Topeka, Kansas, on January 28, 1998.

**APPEARANCES**

Steven R. Wilson of Wichita, Kansas, appeared on behalf of claimant. Terry J. Torline, also of Wichita, Kansas, appeared on behalf of respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the stipulations of the parties are listed in the Award.

**ISSUES**

The Administrative Law Judge awarded benefits for a 64.38 percent work disability based upon a 100 percent wage loss and a 28.75 percent task loss. The sole issue on appeal is the nature and extent of disability. Respondent contends both the task loss and the wage loss factors should be modified. The task loss should, according to respondent, be modified because the Administrative Law Judge relied upon but misread the task loss

opinion by Pedro A. Murati, M.D. The wage loss should, according to respondent, be treated as zero for a period after the accident when claimant was not authorized to work in the United States. For the period after February 27, 1996, when claimant obtained authorization to work in the United States, respondent argues the wage loss should be based on claimant's wage earning ability, not actual wage. Respondent relies for this argument on the principles stated in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Award by the Administrative Law Judge should be affirmed.

#### **Findings of Fact**

(1) Claimant injured his low back while performing his duties as a Foam Technician II for respondent. The initial injury occurred while changing a mold. Claimant alleged continuing aggravation after the initial injury. The parties have stipulated the injury arose out of and in the course of employment and have stipulated to a period of accident from June 1 through July 1, 1995.

(2) Respondent initially referred claimant to Dr. John M. Winblad who in turn referred claimant to Dr. Jacob Amrani. Dr. Amrani prescribed medication and three weeks of physical therapy. On August 18, 1995, Dr. Amrani released claimant to return to work with restrictions of lifting no more than 20 pounds on an occasional basis and 10 pounds on a frequent basis. He also rated claimant's impairment as a 7 percent general body impairment. Claimant was unable to return to his previous job and respondent suggested claimant wait for a possible supervisory job. Claimant applied for a supervisory position with respondent but respondent did not offer him a job. Respondent eventually advised claimant, by letter dated November 30, 1995, respondent would not have a position which would accommodate claimant's restrictions.

(3) The Appeals Board finds claimant made a good faith effort to find employment after his injury. Claimant first sought to be reemployed with respondent and after respondent advised claimant they could not accommodate claimant's restrictions, claimant also applied for work with numerous other employers. Claimant introduced rejection letters from 16 employers bearing dates from December 1995 through July 1996. Claimant applied for and drew unemployment compensation benefits until April 1996 when it was determined that claimant, who is not a United States citizen, was not eligible to work in the United States. Claimant also applied for work with numerous other employers as reflected in the unemployment compensation records introduced as claimant's Exhibits 2 and 7 to the regular hearing.

(4) Dr. Murati performed an independent medical examination at the request of the Administrative Law Judge and summarized his findings in a report dated April 18, 1996. Dr. Murati diagnosed claimant with lumbar strain, rated claimant's impairment as a 5 percent general body impairment, and recommended restrictions. At the time of his deposition, Dr. Murati modified his restrictions based upon functional capacity evaluations done in June of 1996. Based upon that evaluation, Dr. Murati agreed with restrictions recommended by Dr. Amrani. Dr. Murati also agreed that when those restrictions were applied to the task list prepared by vocational expert Francine Knight, claimant has lost the ability to perform 16.5 percent of the tasks he performed in the 15-year work history prior to his injury. Dr. Murati also agreed that claimant has a 41 percent loss of ability to perform tasks he has performed over the same 15-year work history when the restrictions are applied to a job task list prepared by Mr. Jerry Hardin. Based on Dr. Murati's opinions, the Appeals Board finds claimant has a 28.75 percent task loss.

(5) Claimant has not earned a wage since he was terminated from his employment with respondent and, therefore, has a 100 percent wage loss.

(6) Claimant has performed work preparing tax returns for others and owns rental property. His tax returns show a tax loss for both businesses.

(7) Respondent employed Ms. Francine Knight to do job placement for claimant. She was unable to find him employment.

#### Conclusions of Law

(1) K.S.A. 44-510e(a) requires averaging two factors to determine the extent of permanent partial general disability: the percentage loss of ability to perform tasks claimant performed in his or her work over the 15 years preceding the date of accident and the percentage difference between claimant's average weekly wage at the time of the injury and his wage after the injury.

(2) K.S.A. 44-510e also provides that benefits must be limited to functional impairment as long as the employee is engaged in work for wages equal to 90 percent or more of the wage the employee was earning at the time of the injury.

(3) Claimant is not entitled to a wage loss factor based upon actual wage loss unless and until it is shown that claimant exercised good faith in his or her efforts to obtain or retain employment after the injury. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(4) The Appeals Board finds claimant did make a good faith effort to find employment after his injury.

(5) The Appeals Board finds claimant has a work disability beginning no later than February 28, 1996, of 64.38 percent based upon a 100 percent wage loss and a 28.75 percent task loss.

(6) Respondent argues claimant should not be entitled to benefits over and above functional impairment from the period of his termination until February 28, 1996, when claimant regained his eligibility to work in the United States. Claimant, on the other hand, contends that he should be entitled to a work disability during this same period and asserts that he was misled by a communication from respondent into believing that he remained eligible to be employed in the United States.

The Appeals Board notes, however, that under the circumstances of this case, the period in dispute would not affect the amount of benefits awarded claimant. Claimant was paid 27 weeks of temporary total disability benefits at the rate of \$319 per week (for a July 1, 1995, date of accident it should have been \$326). Permanent disability benefits would, therefore, be based upon a total of 403 weeks (15 of the 27 weeks would not be deducted from the total maximum of 415; the remaining 12 weeks of temporary total disability would be deducted leaving the 403 weeks). The parties have stipulated claimant has a 7 percent functional impairment. Claimant would, based upon the 7 percent functional impairment only, be entitled to benefits for 28.21 weeks. The 15 weeks of temporary total disability benefits plus 28.21 weeks of permanent partial disability benefits totals 43.21 weeks and the total number of weeks between the date claimant was released to return to work, August 18, 1995, and the date he regained his eligibility to work in the United States, February 27, 1996, is only 27.71 weeks. If, as the Board has found, claimant is eligible for work disability benefits as of February 28, 1996, the previous weeks of permanent partial disability benefits would be deducted from the number of weeks remaining to be paid. However, the total number of weeks would remain unchanged. The work disability effective February 28, 1996, would be calculated based on the 415 week total less the weeks of temporary total benefits over 15 weeks and the weeks previously paid would be credited against the total of 259.45 weeks. In either event, claimant is entitled to a total of 259.45 weeks of permanent partial disability benefits at the rate of \$326 per week in addition to temporary total benefits paid. Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, \_\_\_ P.2d \_\_\_ (1997).

### **AWARD**

**WHEREFORE**, the Appeals Board finds that the Award entered by Administrative Law Judge Nelsonna Potts Barnes, dated July 21, 1997, should be, and is hereby, affirmed.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Oliver A. Duru, and against the respondent, Rubbermaid Specialty Products, for an accidental injury which

occurred from June 1 through July 1, 1995, and based upon an average weekly wage of \$580.66 for 27 weeks of temporary total disability compensation at the rate of \$319 per week or \$8,802.00, followed by 259.45 weeks at the rate of \$326 per week or \$84,580.70, for a 64.38% permanent partial work disability, making a total award of \$93,382.70.

As of February 27, 1998, there is due and owing claimant 27 weeks of temporary total disability compensation at the rate of \$326 per week or \$8,802.00, followed by 111.86 weeks of permanent partial compensation at the rate of \$326 per week in the sum of \$36,466.36 for a total of \$45,268.36, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$48,114.34 is to be paid for 147.59 weeks at the rate of \$326 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Wichita, KS  
David S. Wooding, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director